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No. 835

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT REYNOLDS METALS COMPANY

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OPINIONS BELOW

The opinion of the District Court denying Respondent Reynolds' motion to dismiss (29a-38a)[1] is reported at 291 F. Supp. 786. The opinion of the District Court ruling for Petitioner Dewey on the merits (89a-103a) is reported at 300 F. Supp. 709. The opinion of the District Court denying a motion to stay execution (103a-111a), is reported at 304 F. Supp. 1116. The opinions of the Court of Appeals, the majority holding for Respondent Reynolds on the merits and remanding with instructions to dismiss the complaint (122a-140a), are reported at 429 F. 2d 324. The opinions of the Court of Appeals, the majority denying

[1] Figures in parentheses are references to page numbers of Single Appendix.

the petition for rehearing and rehearing *en banc* (141a-148a), are reported at 429 F. 2d 334.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1970. A petition for rehearing was denied on August 11, 1970. The petition for writ of certiorari was filed on October 12, 1970. The jurisdiction of this Court was invoked under 28 USC Section 1254(1). Certiorari was granted January 18, 1971.

STATUTES AND REGULATIONS INVOLVED[2]

Civil Rights Act of 1964, Title VII:

Section 703(a)(1)
(42 USC Section 2000e-2(a)(1))

Section 703(h)
(42 USC Section 2000e-2(h))

Section 706(g)
(42 USC Section 2000e-5(g))

Section 713(a)
(42 USC Section 2000e-12(a))

Section 713(b)
(42 USC Section 2000e-12(b))

Equal Employment Opportunity Commission Guidelines:

Religious Discrimination Guidelines
(Effective June 15, 1966)
(29 C.F.R. 1605.1)

Religious Discrimination Guidelines
(Effective July 10, 1967)
(29 C.F.R. 1605.1)

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[2] Text is set forth in Addendum to Brief.

QUESTIONS PRESENTED

I.

Was Petitioner Dewey's discharge from employment with Respondent Reynolds Metals Company in violation of Title VII of the Civil Rights Act of 1964 (42 USC §2000e)?

II.

Was the assignment of Petitioner Dewey to Sunday overtime pursuant to the compulsory work provisions of the Labor Agreement and his discharge for refusal to accept such assignment or obtain a qualified substitute within the bona fide seniority system exception of Section 703(h) of Title VII (42 USC §2000e-2(h))?

III.

Does the Civil Rights Act of 1964 prohibition against discrimination in employment because of religion include an obligation to accommodate the religious needs of Petitioner Dewey?

IV.

Was the discharge of Petitioner Dewey in good faith reliance on the Labor Agreement?

V.

By pursuing the contractual grievance-arbitration procedure provided in the Collective Bargaining Agreement to final determination, did Petitioner Dewey make a binding election of remedies which precluded any action in a Federal District Court under the Civil Rights Act of 1964?

STATEMENT

This is an action for money damages and reinstatement of position brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000e, Petitioner Dewey claiming

that he was wrongfully discharged from employment by Respondent Reynolds Metals Company because of his religious beliefs.

Respondent Reynolds is a corporation maintaining a "job type" plant in Wyoming, Michigan where it produces on an order basis[3] aluminum extrusions and aluminum billets which find principal use in such industries as architecture, building, transportation, aircraft and missile, Paragraph 2, Stipulation Of Facts (39a). Prior to 1964 the plant was accustomed to operating on a five day weekly schedule. Due to an increase in business, during 1964 and 1965 the plant operated on a schedule that was described as "five plus" days which meant that the plant was operating on many Saturdays. This schedule was further increased in late 1965 and 1966 when the plant operated on a "six plus" days weekly schedule which meant that Saturdays were worked regularly and there were numerous Sunday work schedules, Paragraph 3, Stipulation Of Facts (39a).

The production and maintenance employees at Respondent's plant (which number included Petitioner Dewey) have been and continue to be represented by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union) with whom the Respondent had a Labor Agreement. As an

[3] This is not a mass production plant in the sense that products are manufactured to stock or before they have been ordered. Rather, a product is produced after an order therefor has been taken making it necessary for Respondent to meet delivery dates which have been set by its customers. Obviously, it is necessary for Respondent to satisfy its customers on delivery dates if it is to stay in business. Therefore, in a very real sense in times of high business activity, such as occurred in 1965 and 1966 when there was both an increase in commercial business and military requirements (26a), difficulty in scheduling overtime would result in a great hardship on Respondent.

employee of Respondent, and a Union member, Petitioner was at all times subject to said Labor Agreement, Paragraphs 4 and 5, Stipulation Of Facts (39a-40a).

Prior to the 1960 Labor Agreement between Respondent Reynolds and the Union, overtime was performed on a voluntary basis on the part of each employee. Because of employee unwillingness to work on certain overtime days such as Sunday the scheduling of overtime production was made impossible on such overtime days, Paragraph 6, Stipulation Of Facts (40a). The 1960 Labor Agreement and subsequent Labor Agreements including that negotiated with the Union in 1965 dealt with this difficulty. Respondent negotiated a section which both granted the right to Respondent to set overtime schedules and created the obligation on the part of the employees to work both straight time and overtime work required of them unless they had a substantial and justifiable reason for not doing so. The 1965 Labor Agreement also specified the manner in which the overtime assignments were to be implemented. Such assignments were to be divided as equally as possible in each job classification in each department; if less than all employees in a classification were needed, the number required were to be scheduled pursuant to the overtime equalization chart and when there were not sufficient employees obtained on such voluntary basis, then the overtime was to be assigned by Respondent among the qualified employees in the classification in the inverse order of their seniority, Paragraphs 7 and 8, Stipulation Of Facts (40a-41a).

There was also voluntarily issued by the Respondent, at the time the 1965 Labor Agreement was finalized in September 1965, an interpretation of the Labor Agree-

ment which provided that an employee would be relieved of his obligation to personally work overtime if such an employee furnished a qualified substitute. This replacement system incorporated the contractual principle that the overtime obligation remained with the employee. Such system has been used extensively since its establishment, Paragraph 9, Stipulation Of Facts (41a).

In addition to the Labor Agreement, Respondent Reynolds has also had in effect since 1957 Plant Rules which are posted on bulletin boards in each department. The Rules, including Plant Rule 11 which coyers "absence from work without reasonable cause," provide for progressive discipline running from a warning for the first offense, one week layoff for the second offense, and discharge for the third offense. Under the provision of these Plant Rules, the Respondent does have the option of imposing a lesser penalty if circumstances so warrant, Paragraph 10, Stipulation Of Facts (41a).

Petitioner Dewey was employed by Respondent Reynolds at its plant on June 14, 1951 and has held various jobs including that of die repairman, which was the job he held at his discharge September 12, 1966, Paragraph 1, Stipulation Of Facts (39a). Petitioner Dewey performed some Sunday work before his religious beliefs took form in 1961 (72a). Petitioner became a member of the Faith Reformed Church on December 4, 1961. From December 4, 1961 until his discharge, while Petitioner never volunteered for Sunday overtime work, he has been assigned Sunday work and he has volunteered for overtime work on days other than Sunday during such period, Paragraphs 11 through 15, Stipulation Of Facts (41a-42a).

Petitioner Dewey was scheduled to work overtime on

Sunday, November 21, 1965 pursuant to the Labor Agreement. Petitioner refused because of his religious beliefs; he was given a verbal warning and at the same time was advised of the necessity of Respondent scheduling work on a seven (7) day basis and was told that a repetition of such conduct would result in disciplinary action under Plant Rule 11, Paragraph 14, Stipulation Of Facts (42a).

Thereafter, between January 1966 and up to but not including August 28, 1966, Petitioner Dewey was scheduled for overtime on at least five (5) Sundays pursuant to the Labor Agreement. On each of said days Petitioner obtained replacements in accordance with the replacement system, Paragraph 15, Stipulation Of Facts (42a).

Petitioner Dewey was scheduled to work overtime on Sundays, August 28, 1966, September 4, 1966 and September 11, 1966 respectively but refused because of his religious beliefs. While Petitioner had expressed his religious beliefs against Sunday work to Respondent Reynolds on prior occasions he had utilized the replacement system. On each of these three Sundays, however, he took the further position that the obtaining of replacements was also against his religious beliefs and at this time he told one particular employee, who had served as his replacement on a number of occasions, that he would not request him to serve as his replacement again. Because of such refusal to work or to obtain replacements Petitioner Dewey was subjected to progressive discipline consisting of a written warning, a three (3) day layoff and finally discharge on September 12, 1966, Paragraphs 16, 17, 19 and 25, Stipulation Of Facts (42a-44a).

On Sunday, August 28, September 4 and September 11 there were four (4), seven (7) and six (6) employees in

the same classification as Petitioner Dewey who were qualified and not working who were available to Petitioner as possible replacements. There were also two (2) other employees, namely, Zagman and Boyer, who were outside the classification but who were qualified, each of whom was present at the end of the prior shift and available on one of the Sundays in question. However, Zagman had been told by Petitioner Dewey that he would no longer ask Zagman to replace him, Paragraphs 16, 17 and 19, Stipulation Of Facts (42a-44a).

Prior to the discharge of Petitioner Dewey, Respondent Reynolds had consistently applied the Labor Agreement and the Plant Rules to employees who refused overtime work assignments on Sunday because of religious beliefs and to employees who refused such assignments on any day for other reasons. This involved disciplinary action of varying degrees, running from warning to discharge depending on whether the violation was the first, second or third occasion, Paragraph 26, Stipulation Of Facts (45a).

Pursuant to the Labor Agreement, Petitioner Dewey filed grievances as to his three (3) day disciplinary layoff and his discharge. The grievances were processed through the grievance procedure and in the final step thereof were submitted to an arbitrator who was mutually agreed to by Respondent Reynolds and the Union. In an Opinion and Award dated June 29, 1967, the arbitrator denied the grievances and sustained the disciplinary layoff and the discharge of Petitioner Dewey, Paragraph 27, Stipulation Of Facts (46a). The arbitrator also sustained the disciplinary layoff of another employee, Hilbert Scholten, in the aforesaid Opinion and Award (78a).

On September 16, 1966, which was a few days before

Petitioner filed his grievance protesting his discharge, Petitioner filed an Application for the Issuance of a Complaint with the Michigan Civil Rights Commission alleging religious discrimination. On December 13, 1966, after investigation, that Commission issued a Notice of Disposition and Order of Dismissal stating the Commission had found insufficient grounds on which to issue a Complaint and application therefor was denied, Paragraphs 29 and 30, Stipulation Of Facts (46a). During the period subsequent to Petitioner Dewey's discharge and prior to January 1967 the United States Office of Federal Contract Compliance was invited to review the charges of discrimination alleged by Petitioner. That Office found no basis for a charge of discrimination (74a).

On January 4, 1967, Petitioner Dewey filed a charge with the Equal Employment Opportunity Commission alleging discrimination on a religious basis. On January 5, 1968, one year after the filing of the charge, the Commission, contrary to the recommendation of the Regional Director of the Equal Employment Opportunity Commission in Cleveland, Ohio that no probable cause be found, determined there was reasonable cause to believe Respondent had engaged in unlawful employment practices under Title VII, Paragraphs 31 and 32, Stipulation Of Facts (46a-47a). Conciliation efforts were made and thereafter Petitioner was notified by letter dated May 3, 1968 that he could institute a civil action in an appropriate Federal Court. Petitioner Dewey commenced the present action within thirty (30) days after the date of said letter, i.e., May 31, 1968.

Respondent Reynolds moved for dismissal for failure to state a claim upon which relief could be granted for

the reason that Respondent had made a binding election of forums. The District Court denied said Motion under date of October 18, 1968 (29a-38a).

After a trial on the merits, the District Court rendered an opinion that the overtime procedures of Respondent violated the Civil Rights Act of 1964. The District Court based its decision on Guidelines issued by the Equal Employment Opportunity Commission in July 1967, which was ten months after Petitioner had been discharged and six months after Petitioner filed his charge with the Equal Employment Opportunity Commission. The District Court also based its decision on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a case which involved state action (89a-103a). Notwithstanding Respondent Reynolds' motion for a stay of the judgment pending disposition of Respondent's appeal to the United States Court of Appeals for the Sixth Circuit, the District Court, under date of July 25, 1969, ordered the reinstatement of Petitioner Dewey with back pay and enjoined Respondent Reynolds from requiring Petitioner Dewey to perform work for Respondent on Sundays. The District Court did stay that part of the Judgment ordering the payment of back wages in the amount of seven thousand two hundred eight-six dollars and ninety-two cents ($7,286.92), upon the filing of a fifteen thousand dollar ($15,000.00) Supersedeas Bond, pending a final disposition of this cause on appeal (103a-121a).

Pursuant to the order of the District Court, Petitioner was offered reinstatement to his former position effective August 22, 1969; reported for employment on August 25, 1969, and has been so employed to date.

Under date of June 4, 1970, following the submission of briefs and oral argument, a majority of the Court of

Appeals for the Sixth Circuit reversed the District Court holding that: Petitioner Dewey's discharge was not discrimination on account of religion; the District Court more appropriately should have applied the 1966 Equal Employment Opportunity Commission Guidelines, with which Respondent Reynolds complied, rather than the 1967 Guidelines which were issued ten months subsequent to the discharge; the discharge was not on account of Petitioner Dewey's religion but rather because Petitioner Dewey violated the provisions of the Collective Bargaining Agreement, which provisions were applied equally to all employees; and in any event Respondent Reynolds had made reasonable accommodation to Petitioner Dewey's religious needs through the vehicle of Respondent Reynolds' replacement system. In addition to its decision on the merits the Court also held that suit in such a matter should not be brought in court after the same subject matter has been finally adjudicated by arbitration (122a-140a).

Thereafter, in response to a petition, a majority of the Judges of the Court of Appeals for the Sixth Circuit voted against a rehearing and a rehearing *en banc* (140a). Under date of August 11, 1970, a majority of the panel who heard the case (Judge McCree having been designated to take the place of Judge Combs who resigned prior to the filing of petition for rehearing) denied the petition for rehearing holding that the Collective Bargaining Agreement was equal in its application to all employees and was uniformly applied, discriminating against no one (141a-148a).

ARGUMENT

Introduction and Summary

Respondent Reynolds Metals Company discharged Petitioner Dewey because he violated the provisions of the

Collective Bargaining Agreement entered into by his Union with his employer, Reynolds Metals Company. The violation consisted not only of his refusing to work on three Sundays when assigned pursuant to the Collective Bargaining Agreement, but also his refusing on each of the Sundays in question to arrange for a replacement, which was an alternate procedure. Petitioner Dewey did arrange for replacements on five occasions but later refused to do this claiming it was a sin.

Respondent Reynolds argues:

I. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion as to employment. The compulsory work provisions of the Collective Bargaining Agreement provided a fair and equitable method of distributing the heavy workload among the employees and Respondent Reynolds uniformly applied the provisions. Said work provisions were adopted in good faith; were uniformly applied; and were negotiated in 1960 and again in 1965 and applied as a business necessity to make possible the operation of the plant in overtime situations which would include Saturday and Sunday work assignments. Title VII was not enacted to secure religious freedom by protecting the free expression of religion from actions of private parties. In any event discharge of an employee under circumstances like those in this case has been held not to violate the First Amendment where the discharge is the Act of a governmental agency.

II. Title VII of the Civil Rights Act of 1964 contains a number of exceptions to its application, one of which permits different terms of employment based upon a bona fide seniority system. The assignment of overtime to Petitioner was provided for by the Collective Bargaining Agree-

ment and specifically by the seniority system contained therein and thus falls within the exception.

III. The Civil Rights Act of 1964 prohibits discrimination in employment because of religion. There is no legal basis upon which to require an affirmative act such as accommodation to religious needs as suggested by the Equal Employment Opportunity Commission. The Commission is authorized by the Act to make interpretations but not to legislate. In requiring accommodation the Equal Employment Opportunity Commission may also be violating the Establishment Clause of the First Amendment to the United States Constitution.

IV. The Guidelines of the Equal Employment Opportunity Commission issued in 1966 interpret the Act to mean that an employer is free to establish a normal work week applicable to all employees and this would not constitute discrimination even though the schedule might not have a uniform effect on all employees. The Act states reliance on a Guideline is a bar to any action of alleged discrimination. Respondent Reynolds complied with this Guideline; the subsequent revision thereof in 1967 by the Equal Employment Opportunity Commission has no effect pursuant to the Act or application to Petitioner's discharge and accordingly the Petition should be dismissed.

The replacement system, which afforded time off for religious observance, established by Respondent Reynolds complied with the more stringent requirements for accommodation in the 1967 Guidelines.

Any further accommodation would be a serious inconvenience to the conduct of Respondent's business.

V. The remedy section of the Civil Rights Act requires an intentional violation to set in motion the remedy of re-

instatement and back pay. Reliance on the Labor Agreement takes this matter out of the intentional violation area.

VI. The rights and remedies sought in the grievance-arbitration system provided in Respondent Reynolds' Collective Bargaining Agreement (not to be discriminated against in the assignment of overtime because of religion, and reinstatement and back pay) are identical with the rights and remedies sought in the Title VII action at law. Consequently the election of remedies rule does apply and Petitioner Dewey should not be allowed to pursue the law action after pursuing the arbitration remedy to a decision. Such a bar to the law action is consistent with *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 398 U.S. 235 (1970) and the Steelworkers Trilogy.

I.

PETITIONER DEWEY'S DISCHARGE FROM EMPLOYMENT WITH RESPONDENT EMPLOYER, REYNOLDS METALS COMPANY, WAS NOT IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (42 USC §2000e).

The part of the Civil Rights Act of 1964 with which we are concerned, Title VII, is entitled Equal Employment Opportunity and declares in part that it is an unlawful employment practice for an employer to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin, (Addendum to Brief, Page 60). It is clear that the prohibition of the Act runs only to discrimination and it is necessary to find a discrimination before a violation of the Act can be

found.[4] Although the Act contains lengthy provisions making it unlawful to "discriminate" because of race, color, religion, sex or national origin as regards employment, the Act does not define the term "discriminate" or the term "discrimination." Presumably, then, "discriminate" would have its commonly accepted meaning which, according to Webster's International Dictionary, is "to make a distinction or to make a difference in treatment or favor (of one as compared to others), as to discriminate in favor of one's friends; to discriminate against a special class." This is the same interpretation employed by Senators Clark (D., Pa.) and Case (R., N.J.), Floor Managers of the Bill, in a memorandum submitted to the Senate defining "discrimination:"

> "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [renumbered as section 703 prior to final passage] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." (110 Cong. Rec. 7213).

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[4] That Congress intended that the gravamen of the offense be discrimination was made plain by Senator Clark (D., Pa.), Floor Manager of the Bill in the Senate when he said:

> "The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. It enables a labor union to admit anyone it wishes to take in. It tells an employment agency that it can get a job for anyone for whom it wishes to get a job.
>
> "All this is subject to *one* qualification, and that *qualification* is to state: 'In your activity as an employer, as a labor union, as an employment agency, *you must not discriminate* because of the color of a man's skin. *You may not discriminate* on the basis of race, color, religion, national origin, or sex'," (emphasis supplied) 110 Cong. Rec. 13079-80.

Title VII was designed, as its entitlement indicates, to guarantee equal opportunity in the job market to all citizens regardless of race, color, religion, sex or national origin. The Title attempts to eliminate those factors from consideration in personnel decisions and to allow other factors such as training, ability, performance, efficiency and capability to be determinative. Respondent Reynolds submits that such equal opportunity was afforded to Petitioner Dewey in the course of his employment with Respondent Reynolds; no violation of Title VII occurred and the evidence supports this contention.

With this background, let us look at the facts. Prior to 1960, overtime in Respondent Reynolds' plant was performed by employees on a voluntary basis and Respondent Reynolds found it impossible to schedule production on certain overtime days such as Saturday and Sunday, Paragraph 6, Stipulation Of Facts (40a). To overcome this problem, Respondent Reynolds negotiated with the Union in 1960 the compulsory work provision set forth in Paragraph 7 of the Stipulation Of Facts (40a). This provision, although sought to be eliminated by the Union (69a), was again negotiated in the 1965 Labor Agreement as Section 3 of Article IX and is set forth in Trial Exhibit A (49a). The immediate succeeding provision of the Labor Agreement, Article IX, Section 4, also set forth in Trial Exhibit A (49a), provides for the allocation of overtime by dividing it equally among the employees in the classification in the department needed on a volunteer basis. If more employees are needed they are assigned in the inverse order of their seniority, Paragraph 8, Stipulation Of Facts (40a-41a). The Labor Agreement provided time and one-half for Saturday work and double time for

Sunday work with the result that such overtime work is accordingly scheduled only after careful consideration.

In addition to the compulsory overtime provision, Respondent, under date of September 20, 1965, issued an interpretation of the Labor Agreement that any employee assigned to overtime could be relieved from such assignment by his arranging for another qualified employee to replace him, Trial Exhibit B (53a-54a). The system has been used extensively since its introduction in September 1965, Paragraph 9, Stipulation Of Facts (41a).

During the years 1964, 1965 and 1966, because of increased business, the plant increased production to the point where it became necessary to work Saturdays regularly and on numerous Sundays. There were twenty-four of thirty-seven Sundays so worked between January 1, 1966 and September 11, 1966, Paragraph 3, Stipulation Of Facts (39a).

With such increased production, Petitioner Dewey was scheduled to work overtime on Sunday, November 21, 1965. Petitioner refused, was given a verbal warning, was advised of the necessity of such work being scheduled and was told that a repetition of his conduct would subject him to discipline, Paragraph 14, Stipulation Of Facts (42a). Petitioner thereafter used the replacement system when assigned overtime work on five Sundays between January and August, 1966, Paragraph 15, Stipulation Of Facts (42a). However, Petitioner Dewey, when assigned overtime work on Sundays falling on August 28, September 4 and September 11, 1966, respectively, refused to work and refused to obtain a replacement. On the basis of such refusals to follow the Labor Agreement, Petitioner Dewey was progressively warned for the August 28th violation,

disciplined with a three day layoff for the September 4th violation, and discharged for the September 11th violation, all in accordance with the Plant Rules, Paragraphs 16, 17 and 19, Stipulation Of Facts (42a-44a).

In the administration of the Labor Agreement during the period prior to Petitioner Dewey's discharge, Respondent Reynolds also took disciplinary action as to a number of other employees who refused overtime assignments on Sundays because of religious beliefs, ranging from four written warnings for first offenses to three separate three day layoffs for second offenses and four individual discharges for third violations. Respondent Reynolds also disciplined other employees for refusing to accept overtime assignments on any day for other reasons, Paragraph 26, Stipulation Of Facts (45a).

Because Respondent's plant could not otherwise meet customers' requirements during the period in question, the scheduling of overtime on Saturdays and Sundays was both reasonable and justified. Respondent operated under a Labor Agreement, binding on both Respondent and Petitioner Dewey, the terms of which authorized Respondent to make overtime assignments and Petitioner Dewey was so assigned. Petitioner violated the Labor Agreement on four occasions in refusing to accept the overtime assignment or, in the alternative, to obtain a replacement, and he was progressively disciplined resulting finally in his discharge. Respondent administered the Labor Agreement both as to Petitioner Dewey and as to other employees on a uniform and nondiscriminatory basis. Petitioner Dewey was never assigned Sunday overtime nor denied such assignments because of religion nor was he in any way treated differently from others in this

respect or because of his refusal to accept an assignment. Such actions do not portray discrimination; rather, they reveal equal employment opportunities for all employees.

This equality of treatment is perhaps best set forth by the majority opinion in the Sixth Circuit Court of Appeals in this matter when they said at pages 128a-129a:

> "We find nothing discriminatory in the provisions of the collective bargaining agreement or in the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them."

This Court's decision in *Griggs* v. *Duke Power Co.*, U.S. Supreme Court (March, 1971), does not require application of a different rule. In *Griggs, supra,* this Court said:

> "Under the Act, practices, . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

There is no suggestion by Petitioner, nor would one be well founded, that the compulsory overtime provisions of the Labor Agreement were applied by Respondent to perpetuate *prior* discriminatory employment practices. Petitioner does not claim Respondent engaged in such prior practices, and in the circumstances of this case, the rationale of *Griggs* does not operate to characterize as discriminatory the employment practice challenged here, which is neutral on its face, nondiscriminatory in intent and evenhanded in its application.

Moreover, even if this Court were to come to a contrary

conclusion as to the applicabilify of the doctrine of *Griggs*, Respondent has sustained the burden of showing the propriety of the compulsory overtime work rule. In setting out the so called "effect" or "impact" interpretation of Title VII in *Griggs, supra*, this Court said:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."

Again, this Court said:

> "But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

All agree that Respondent Reynolds' application of the labor contract was equal in its application to all employees and was uniformly applied. However, Petitioner Dewey asserts that the obligation to work on Sunday or to obtain a substitute has a disproportionate impact on him because of his religious beliefs and because it limits his free exercise of religion it has the effect of being discriminatory under Title VII. Applying this effect-oriented approach to the administration of the Act, Respondent Reynolds asserts that it is also necessary to apply the other part of the interpretation and this requires a review to determine if the reason for the compulsory work assignment clause was grounded on business necessity. Prior to the 1960 Labor Agreement, overtime was performed on a voluntary basis and consequently it was impossible to schedule production on certain overtime days which included Saturdays and

Sundays. The remedy to such a restrictive production situation was to attempt to negotiate with the Union a contract provision which would permit of more production hours if such were determined necessary for business purposes. The present compulsory work assignment clause, which applies to straight time as well as overtime work, was so negotiated as part of a total labor contract with the Union in 1960 and the clause was continued in the labor contracts thereafter including that negotiated in 1965 notwithstanding that the Union sought to eliminate the clause in said negotiations (69a). Without the negotiated compulsory work clause, it was impossible to work the plant in Saturday and Sunday overtime situations prior to 1960. With the clause it was possible to so work the plant overtime in the 1960's to effectuate necessary production which permitted the plant to meet customer demands and thus remain competitive with Alcoa and Kaiser (28a). This was true in 1964 and 1965 and particularly so in 1966, the year of Petitioner Dewey's discipline and discharge, as evidenced by the fact that between January 1, 1966 and September 11, 1966, Sunday production took place on twenty-four of thirty-seven Sundays. It is submitted that the compulsory work assignment clause has a basis which satisfies the touchstone test set forth by this Court in *Griggs, supra;* the clause has a manifest relationship to the operation of the business and was a business necessity. As such the work assignment clause and its uniform application cannot constitute a violation of Title VII within the meaning of *Griggs, supra,* even if the inquiry extends beyond assurance that the clause is neutral to an investigation of its impact in practice.

There is a strong implication in Petitioner's Brief that the Civil Rights Act of 1964 was enacted to secure re-

ligious freedom by prohibiting as to any individual any invasion thereof by private parties. In other words, Petitioner Dewey suggests that the Civil Rights Act was intended as the "alter ego" of the "Free Exercise" Clause of the First Amendment. Page 12 of Petitioner's Brief so indicates when it states:

> "As a result of the enactment of this law [Civil Rights Act of 1964], such a fundamental right as freedom of religion has broader protection than previously. In passing the Civil Rights Act of 1964, Congress recognized that such a fundamental right as freedom of religion may be denied, not only by governmental action but also by the acts of private employers."

Even if this were so, it does not follow that Respondent's conduct violated the Civil Rights Act of 1964. In fact, the opposite is the case, for it has recently been held that the discharge by the Post Office Department of an employee who, contrary to union agreement, refused to perform assigned work on Saturdays because of religious scruples, does not constitute a violation of the First Amendment religious guarantees. *Dawson* v. *Mizell,* (E.D. Va. March 24, 1971).[5] The Court concluded that "there is no constitutional prohibition against the defendant insisting that plaintiff either agree to perform the duties assigned to him or suffer the consequences," and that there was "no infringement of plaintiff's rights concerning his religious beliefs."

In any event, the purpose of the Free Exercise Clause is

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[5] Because of the recent issuance of this decision it is not readily available. Accordingly, a copy thereof is herewith made available in the Addendum to Brief (Page 66).

to secure religious liberty in an individual by prohibiting any invasion thereof by civil authority. *School District of Abington Township, Pa.* v. *Schempp,* 374 U.S. 203 (1963). The issue in the present case does not involve the Free Exercise Clause; it involves the application of Title VII which among other things forbids an employer to discriminate in the terms and conditions of employment (including hiring and discharge) with the intent of providing equal employment opportunity for all persons regardless of such a factor as religion. The basic question is whether Respondent afforded Petitioner Dewey the same opportunity as everyone else in the administration of the Labor Agreement and the Plant Rules. The issue is not whether Petitioner Dewey can freely exercise his religion regardless of the Labor Agreement and regardless of how everyone else in the plant is treated.

Judge Learned Hand rejected the contention that a railroad worker had a constitutional right to reinstatement subsequent to his discharge for refusal because of religious scruples to join a union under a union contract clause when he said:

> ". . . The First Amendment protects one against action by the government, . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . ." *Otten* v. *Baltimore & O. R. Co.,* 205 F. 2d 58, 61 (2d Cir. 1953); *Accord, Gray* v. *Gulf Mobile & Ohio Railroad Company,* 302 F. Supp. 292 (D. C. Ala. 1969), aff'd 429 F. 2d 1064, 1072 (5th Cir. 1970).

In *Griggs* v. *Duke Power Co., supra,* this Court expressed the essence of the Civil Rights Act of 1964 when it said:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . .
>
> "In short, the Act does not command that any person be hired . . . because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Petitioner Dewey is not seeking equality of treatment from Respondent Reynolds Metals Company. In every sense of the word, his insistence that he not be obliged to work any Sundays when required by the Labor Agreement is a demand for preferential treatment not accorded other employees. This constitutes an insistence that his pursuit of his interests requires that others must conform their conduct to his religious necessities. Such a demand has no basis even under the First Amendment (which is not at issue here). It likewise has no basis under Title VII nor anywhere else in the Civil Rights Act of 1964.

The Michigan Civil Rights Commission, as established pursuant to the Michigan Constitution, interpreted Michigan statutory language identical to that in Title VII when it had this same case before it for decision in December 1966. It dismissed the charge holding that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, absent any intent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs, Trial Exhibit K (81a-82a). It is submitted that this Honorable Court should so dismiss the Petition in this matter.

II.

THE ASSIGNMENT OF PETITIONER DEWEY TO SUNDAY OVERTIME PURSUANT TO COMPULSORY WORK PROVISIONS OF THE LABOR AGREEMENT AND HIS DISCHARGE FOR REFUSAL TO ACCEPT SUCH ASSIGNMENT OR OBTAIN A QUALIFIED SUBSTITUTE WAS WITHIN THE BONA FIDE SENIORITY SYSTEM EXCEPTION OF SECTION 703(h) OF TITLE VII (42 USC §2000e-2(h)).

Title VII of the Civil Rights Act contains a number of exceptions to its application among which is Section 703(h), set out in detail at page 60, Addendum to Brief, which states that notwithstanding any other provision of Title VII an employer may apply different standards of compensation or different terms, conditions or privileges of employment pursuant to certain seniority systems. However, such variations must be pursuant to a bona fide seniority system and not the result of an intention to discriminate because of race, color, religion, sex or national origin.

What is the meaning of this exception? The problem of interpreting the statute is primarily one of discovering the intention of the legislative body which enacted it. Many times the meaning is clear on its face and courts need go no further. In the case of the Civil Rights Act the search for the legislative intent is more difficult than usual. The original House Bill (H.R. 7152) was modified substantially by the Dirksen-Mansfield-Kuchel-Humphrey Bill which was substituted for the House Bill in the Senate and was then accepted by the House. The substitute Bill was worked out in informal bipartisan conferences in the Senate and did not go through the usual committee procedures. Consequently there was no committee report in the Senate. Since the House then voted to accept the Dirksen-Humphrey Bill

without changes, there is no conference report. The best available explanations of the changes made in the House Bill are statements offered during the Senate debate by various senators, including Senator Clark (D., Pa.) and Senator Dirksen (R., Ill.). (Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 289).

During the Senate debate Senator Dirksen submitted a memorandum questioning a number of provisions in the Bill. (Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 332; 110 Cong. Rec. 6995-7). The text of some of the questions pertaining to Title VII and Senator Clark's response thereto is in part set out below:

> "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> "Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race."

At the request of Senator Clark the Justice Department prepared a rebuttal to certain arguments made by Senator Hill (D., Ala.) concerning the effect of Title VII on seniority rights under a labor contract. (Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 326; 110 Cong. Rec. 6986). This rebuttal stated in part:

> "First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race."

After the Senate debate which included among other things the above exchanges, Senator Dirksen introduced an amendment which is now found in the above mentioned Section 703(h) of Title VII and it states in part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . ."

Concerning this Section, Senator Dirksen said in part:

> "New subsection (h) provides that an employer may apply different standards of compensation, or different terms, conditions, or privileges of employment (1) pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." (Bu-

reau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 292; 110 Cong. Rec. 12381-12385).

In the application of the principles set forth above to the instant case, the Respondent's Labor Agreement is one that has been bargained with the Union in good faith over a period of years running from a point prior to 1960; it contained a bona fide seniority system; it also contained a compulsory work assignment system first negotiated in 1960, the implementation of which was tied to the seniority system. The assignment of overtime in the present instance is governed by the Labor Agreement. Under such a state of facts, the application of the Labor Agreement to Petitioner Dewey and his fellow employees resulted in various overtime assignments including Sundays which resulted in different employees working Sundays from time to time depending on the number of volunteers and the application of the seniority clause. The Justice Department rebuttal quoted by Senator Clark, stated that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "'low man on the totem pole,'' he is not being discriminated against because of his race. It follows that when a worker is assigned overtime on a Sunday because under established seniority rules he is the "low man,'' he is not being discriminated against because of his religion. The obligation to work overtime contained in Respondent's Labor Agreement is a condition or term of employment in the language of 703(h), which condition or term is applied pursuant to a bona fide seniority system.

Further analysis of Section 703(h) shows that in order for this statutory exception to be operative the different terms or conditions or privileges of employment must not

be the "result of an intention to discriminate." In other words, to defeat a defense based upon the bona fide seniority system exception, the Petitioner must prove (a) that the employer intended to discriminate against him; and (b) that the differences in the terms, conditions or privileges of employment received are the result of such intention to discriminate. There was no showing to the District Court in the course of trial that there was any intent on the part of Respondent to discriminate against Petitioner Dewey nor that the Sunday work assignments made pursuant to the seniority clause were the result of any intent to discriminate.

The evidence in this case together with the legislative history and the inclusion of Section 703(h) in Title VII of the Civil Rights Act pertaining to the effect and application of a labor contract indicate that Petitioner Dewey was not subjected to unequal treatment or discrimination because of his religious creed within the meaning of Title VII; rather, reasonable employment criteria were applied, i.e., the compulsory overtime clause as implemented by the seniority provisions of the Labor Agreement and Petitioner Dewey by his refusals to abide by same subjected himself to justifiable discharge thereunder. Accordingly the Petition should be dismissed.

III.

THE CIVIL RIGHTS ACT OF 1964 (42 USC §2000e) PROHIBITION AGAINST DISCRIMINATION IN EMPLOYMENT BECAUSE OF RELIGION DOES NOT INCLUDE AN OBLIGATION TO ACCOMMODATE THE RELIGIOUS NEEDS OF PETITIONER DEWEY.

Virtually all statutes attacking bias in employment include a specific prohibition against religious or creed discrimination in employment. This is true for the Civil Rights

Act of 1964. It is also the case as to the ban on government contract employment discrimination promulgated by Executive Order 11246 and predecessor orders. Most state statutes in the area also provide such a ban, as for example, Michigan law, under which the Michigan Civil Rights Commission found insufficient cause and dismissed the present case in 1966 (81a-82a), which reads, in part at Section 423.303, Michigan Compiled Laws Annotated (Stat. Ann. 1968 Rev., §17.458(3)) as follows:

> "It shall be an unfair employment practice:
>
> "(a) For any employer, because of the . . . religion . . . of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment . . ."

But having banned religious bias in employment most laws, including the Civil Rights Act of 1964 and Executive Orders (until the Department of Labor published in the Federal Register on December 24, 1970 proposed rules on the ban against religious discrimination in government contract employment), do little to spell out the meaning of the ban. The major thrust of this legislation appears to be to prevent an employer from determining during the hiring process, the religious affiliation, if any, of the applicant. But having done this, once employees are hired, without knowledge of the individual's religion, questions do arise as to the employee's right to pursue his religious beliefs. One question that inevitably arises is whether employers will discriminate on the basis of religion in a manner banned by law if they do not accommodate special requests of employees for time off for religious reasons.

The Equal Employment Opportunity Commission has answered the question twice, the first time in 1966 and

again in 1967. In June 1966 the answer was put in a Guideline as follows:

> "... The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business." (Addendum to Brief, Page 63).

The Commission also believed and stated in the same 1966 Guideline that an employer was free to establish a normal work week generally applicable to all employees, and such was not a violation of Title VII even though such a schedule, as in the present case, might not operate with uniformity in its effect upon the religious observances of all his employees. Respondent will comment and apply this Guideline in a subsequent part of this Brief.

In 1967 the Commission believed:

> "... that the duty not to discriminate on religious grounds, ... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." (Addendum to Brief, Page 65).

With the exception of the District Court opinion in this matter (100a-103a), the courts that have addressed themselves to the question of accommodation have ruled that the ban on discrimination does not include accommodation.

In response to the Petition for Rehearing in the present case, the majority opinion of the Sixth Circuit stated:

> "Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act." (141a)

In a latter part of the same opinion:

> "The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." (143a)

In *Stimpel* v. *State Personnel Board of the State of California*, 85 Cal. Rptr. 797, 63 LC ¶9534 (Cal. Ct. of App., 2nd District, 1970); petition for hearing denied, 63 LC ¶9534 (Cal. S. Ct.); cert. denied 3 EPD ¶8049 (U.S. S. Ct. 1970), the California Court of Appeals was faced with the issue of whether or not the State should accommodate a Seventh Day Adventist who, because of his religious beliefs, refused to work on Saturday although employed as an inspector in a six day a week job. That Court held in part at paragraph 9534:

> "The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to com-

plain if he is discharged for failing to fullfill his duties."

In a recent case in the State of New York, *Eastern Greyhound Lines v. New York State Division of Human Rights*, 27 N.Y. 2d 279 (N.Y. Ct. of App. 1970), 3 EPD ¶8081 (1970), the Court of Appeals was asked to determine if an employer's decision not to employ an individual because he wore a beard required because of religious beliefs as an Orthodox Muslim was religious discrimination banned by New York law. At paragraph 8081 that Court held:

> "There is here no suggestion of such motivation [discrimination against creed] and, indeed, the record shows [the Company] employs a number of Muslims. The issue thus becomes very narrow: whether an employer must accommodate his general pattern of employment to the special requirements of each individual's religion.
>
> "The failure to make this kind of accommodation to particularization, which could assume many variations in appearance and in time schedules, is not in itself or in the absence of actual discrimination based on creed, a violation of . . . the Human Rights Law."

The ban on discrimination in employment is intended to provide equal employment opportunity regardless of religion. The Civil Rights statute is a mandate against differentiating between employees because of religion. On the other hand, accommodate means to adjust, adapt, help, do a favor for. In other words, to accommodate for religious purposes is to differentiate or distinguish because of religion. The concept of accommodation not only does not have any basis in the statute; in fact accommodation is a form of discrimination in and of itself. Observe the consequences of accommodation as proposed in this matter

by Petitioner and the United States. Except Petitioner Dewey from Sunday work, when his turn arises, and impose the requirement on another employee who has no religious affiliation. The consequence is that Petitioner is freed of his obligation to work because of his religion while the employee imposed on is burdened because of no religion. This specifically violates the Act in the manner proscribed by Congress because religion is the touchstone of such action. Equal opportunity does not require special opportunity or privileged opportunity. It is Respondent Reynolds' position that the Equal Employment Opportunity Commission, by virtue of Section 713(b) of the Civil Rights Act (42 USC §2000e-12(b)), has the authority to interpret the Act. The Civil Rights Act, however, did not give the Equal Employment Opportunity Commission substantive authority to make law. In this instance the Equal Employment Opportunity Commission is making law and in requiring accommodation it has exceeded its authority under the Act. "Religious discrimination should not be equated with failure to accommodate." *Dawson* v. *Mizell, supra.*

Not only does the Civil Rights Act not authorize accommodation, but the Equal Employment Opportunity Commission in adopting Guidelines which compel an employer to accommodate religious beliefs of all his employees raises the question of a violation of the Establishment Clause of the First Amendment to the United States Constitution. This Court has held in *School District of Abington Township, Pa.* v. *Schempp,* 374 U.S. 203 (1963) that the Government must be neutral with respect to religious matters. The Court at page 222 of *Schempp, supra,* declared:

". . . [W]hat are the purpose and the primary

> effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

The Government is without power to support, assist, favor or handicap any religion. It is submitted that an administrative arm of the Government, in the form of the Equal Employment Opportunity Commission, is in fact assisting or favoring religion through its Guidelines in which it requires accommodation and such activity is forbidden by the Establishment Clause.

Respondent respectfully submits that there is no obligation to accommodate, that Respondent has in fact complied with the Act and that the Petition should be dismissed.

IV.

ASSUMING ARGUENDO THAT THE PROHIBITION OF THE CIVIL RIGHTS ACT OF 1964 (42 USC §2000e) AGAINST DISCRIMINATION IN EMPLOYMENT BECAUSE OF RELIGION INCLUDES AN OBLIGATION TO ACCOMMODATE THE RELIGIOUS NEEDS OF EMPLOYEES, RESPONDENT REYNOLDS METALS COMPANY HAS SO ACCOMMODATED PETITIONER DEWEY.

The discussion of accommodation by Petitioner Dewey at pages 13-16 of his Brief is based upon the concept that the right protected by the Civil Rights Act is a right of Free Exercise of religion. The cases cited relate to a balancing of interests when the Constitution is involved and it is respectfully submitted that they are not applicable to the present matter involving the interpretation of the Civil Rights Act. Rather, it is proposed that we observe

the approach of the Equal Employment Opportunity Commission to the Act to determine if Respondent Reynolds has an obligation to accommodate, and, if so, what is a reasonable accommodation.

The Guidelines set forth in an Addendum to this Brief (Pages 63-65) purport to be interpretations by the Equal Employment Opportunity Commission as to the scope and application of the Civil Rights Act of 1964 made pursuant to Section 713(b) of said Act (42 USC §2000e-12(b)). Said Section provides that good faith compliance with a Commission interpretation is a defense in agency and court proceedings to any alleged unlawful employment practices. There were no such Guidelines as to religious discrimination when Petitioner Dewey first violated the Labor Agreement in November 1965. The first Guidelines as to religious discrimination were effective June 15, 1966; the second such Guidelines were effective July 10, 1967.

When Petitioner Dewey violated the Labor Agreement in August and September 1966 and was disciplined and finally discharged, the June 1966 Guidelines were effective, (Addendum to Brief, Page 63). Section 1605.1(a)(2) of such Guidelines states that the Commission believes that the duty not to discriminate on religious grounds includes an obligation by the employer to accommodate the reasonable religious needs of employees where such accommodation can be made without serious inconvenience to the conduct of the business. However, the 1966 Guidelines provide in the Section immediately following a general exception to this obligation which reads:

Section 1605.1(a):

> "(3) However, the Commission believes that an employer is free under Title VII to establish a nor-

mal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur."

Respondent Reynolds established a normal work week including overtime requirements in accordance with its Labor Agreement, which schedule was generally applicable to all employees. This action was taken long prior to the discharge of Petitioner Dewey; also prior to the effective date of the Civil Rights Act; and was continued after the issuance of the June 1966 Guidelines with Respondent Reynolds believing after the issuance thereof that it was squarely in conformance therewith. Under the above quoted 1966 Guidelines, notwithstanding the fact that the schedule might not operate with uniformity in its effect upon the religious observances of all employees including Petitioner Dewey when assigned to Sunday work, it is submitted that Respondent Reynolds complied with said Guidelines, relied thereon, and consequently has a good faith defense under said Section 713(b), which defense should be a bar to this action. The subsequent revision of the Guidelines in July 1967, wherein the Commission no longer provided definite guidelines for the assistance of employers, does not eliminate the bar to the present action. Section 713(b) of Title VII specifies that such bar shall continue notwithstanding the fact that an interpretation is modified or rescinded.

The United States Brief at footnote 15 on Page 32 thereof attempts to picture to this Court that the 1966 and 1967 Guidelines were essentially the same in requiring accommodation for religious needs; the chief difference being that the 1966 version had some illustrations of practices that were acceptable despite impact on religious practice; but that in any event Respondent Reynolds did not in identical fashion fulfill any of the illustrations. Consequently, the United States argues that it was proper to apply the general standard set forth in both Guidelines.

In response, Respondent Reynolds asserts the 1966 and 1967 Guidelines are *not* essentially the same. The chief difference is *not* the existence of limited illustrations of acceptable practices. Rather, the *chief difference* is the existence in the 1966 Guidelines at 1605.1(a)(3) of a general exception to the accommodation obligation which is not found in the 1967 Guidelines. This exception is followed by another paragraph (b) in which the Commission sets forth "illustrations" of what might constitute accommodation in specific situations where accommodation is warranted. Respondent Reynolds further asserts that it *did* fulfill the general exception in that it established a normal work week applicable to all its employees prior to and continued to do so after the issuance of the 1966 Guidelines. This was equal and uniform application to all employees which complied with the principle enunciated in the Guidelines. Consequently it is not proper to apply the general standard set forth in both Guidelines. To state as does the United States Brief that Respondent Reynolds did not identically follow the illustration by having all employees work on Saturday or Sunday is to completely misunderstand the purpose of an illustration. The principle

of the exception was articulated in the Guidelines. It was based on equal or uniform application to all employees. An illustration is merely an example intended not to exhaust the meaning of a principle, but to assist in its interpretation or understanding; it is not set forth for the purpose of slavish adherence. To restrict the Respondent or anyone else to the specific illustration is an attempt to exhalt the illustration of the exception over the exception itself.

The 1966 Guidelines at Section 1605.1(b)(3) also authorized the employer to prescribe "the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs." Petitioner Dewey did not acquire his religious beliefs until after Respondent Reynolds had entered into the 1960 Collective Bargaining Agreement negotiated by the Union which required all employees to work overtime when so assigned (41a). Petitioner Dewey thus had actual knowledge that the requirements of the Collective Bargaining Agreement would conflict with his subsequently acquired religious needs. Under the 1966 Guidelines, Petitioner had no right to demand accommodation. There was no claim that Respondent intended to discriminate on religious grounds. The Guidelines had the force and effect of law and again constitute a good faith defense to this action under Section 713(b) notwithstanding the subsequent revision of the Guidelines.

Should one ignore the exceptions in the Guidelines and

apply the general requirement of accommodating the reasonable religious needs of employees (1966) or of making reasonable accommodations to the religious needs of employees (1967) (Addendum to Brief, Pages 63-65), it is submitted that Respondent has complied with the Guidelines. For example, in allocating overtime, Respondent Reynolds has fulfilled the accommodation requirement by first requesting volunteers to perform the overtime. Thereafter, when an employee is assigned overtime under the Labor Agreement, there is a further accommodation in that he can free himself of the obligation by obtaining a qualified replacement. This replacement system has been used extensively since 1965, Paragraph 9, Stipulation Of Facts (41a). Petitioner Dewey used the replacement system on at least five (5) Sundays in 1966 after which time he altered his religious belief and refused to obtain a replacement as in the past. It is submitted that Respondent Reynolds has made an accommodation that fully complies with the Guidelines whether expressed in terms of accommodating reasonable religious needs (1966) or reasonably accommodating religious needs (1967) in that it permitted Petitioner Dewey, by the use of the replacement system, to observe Sunday as his Sabbath and as a consequence not work on such days, which is the religious need to which the Guidelines are totally and specifically directed.

However, the District Court found that requiring an employee to obtain his own replacement might be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as Petitioner Dewey does, that it is a sin to induce another to commit the sin of working on Sunday. As to this sincere religious belief of Petitioner Dewey, says the District Court, the Respondent has made no accommoda-

tion (101a), A reading of the Guidelines discloses that the Equal Employment Opportunity Commission believes the duty not to discriminate on religious grounds includes an obligation by the employer to make reasonable accommodations to the religious needs of employees where such can be done without undue hardship on the conduct of employer's business. What are the religious needs to which reference is made in the Guidelines? The needs are those of an employee whose religious observances require that he take time off during the employer's regular work week (1966) or who regularly observes a day of the week as his Sabbath and as a consequence does not work on such days. Respondent's substitute system accommodates this need for time off by relieving an employee of his work assignment on his Sabbath thus fulfilling the obligation as viewed by the Guidelines. When the District Court goes further and says that Respondent's substitute system is not an accommodation for Petitioner Dewey who believes it a sin to ask another to work (101a), this argument is based on the free exercise of religion argument not on the issue of discrimination and it also goes beyond anything set forth in the Guidelines. There is no such free exercise right carried over from the Constitution to the Civil Rights Act either by the Preamble or by the language of the Act; the Guideline language specifically talks in terms of religious needs, i.e., not working on a certain day of the week, and it does not talk in terms of beliefs.

However, assuming for the sake of argument that this Court should decide that the religious need to be accommodated is not necessarily confined to observance of a Sabbath, but that it is broader in scope, this raises a further question. What is the reasonable accommodation re-

quired of an employer pursuant to the Guidelines? The District Court held that there was no accommodation to Petitioner's belief that it was a sin to request others to work for him on Sunday. The Court of Appeals for the Sixth Circuit found Respondent made a reasonable accommodation to the religious needs of its employees when it permitted Petitioner, by the replacement system, to observe Sunday as his Sabbath (132a). The Guidelines are phrased in terms that require a reasonable accommodation to religious needs. It is necessary to consider the need under consideration and then relate it to the Guideline requirements. The beliefs which Petitioner Dewey professes to hold in relation to asking others to work for him on Sunday are private and subjective and there is no evidence in the record to support the view that they are required by the announced principles of any formal religion. It is suggested that it is unreasonable to expect accommodations to meet the private and subjective religious notions as set forth by each individual. Where an accommodation has been made which is adequate to meet the announced principles of any formal religion on the issue in question (observance of Sundays in this case), it is suggested that such an accommodation is reasonable within the meaning of the Guidelines and consequently the requirements of the Guidelines have been fulfilled.

The District Court held that requiring the Petitioner to obtain his replacement, either was no accommodation or was not a reasonable accommodation. What further accommodation could be made? The obvious answer would be for the Respondent to obtain the substitute on the occasions when Petitioner Dewey was scheduled to work. The issue then is whether in the words of the Guidelines such an accommo-

dation could be made without serious inconvenience (1966) to or without undue hardship (1967) on the Respondent's business. Respondent Reynolds contends the answer must be in the negative for the reasons set forth below.

The compulsory work clause was negotiated into the Labor Agreement with the Union in 1960 to overcome the inability to schedule overtime and was included in the 1965 Agreement. The substitute system was initiated by Respondent Reynolds in 1965 and was used extensively. The substitute system is an extension of the negotiated compulsory work clause because the obligation continues to rest on the employee. The proof establishes that Respondent does not accord special privileges with respect to work assignments to individual employees whether the reason proposed for the privilege was religious or secular, Paragraph 26, Stipulation Of Facts (45a). If Respondent Reynolds were to obtain substitutes for Petitioner Dewey on every occasion he was assigned Sunday overtime, Respondent Reynolds would be excepting Petitioner Dewey from the compulsory work assignment clause. Under such circumstances Respondent Reynolds would be obliged on the basis of equal and impartial administration of the Labor Agreement to so except other employees in the many other classifications in the plant who did not want to perform overtime on Sundays and other overtime situations whether the reason be religious or secular. This would contractually negate the compulsory work assignment clause and without such a clause Respondent Reynolds would very well find itself in a position comparable to or worse than that of pre-1960, where Respondent Reynolds found it impossible to schedule overtime on certain overtime days.

Petitioner argues at page 19 of his Brief that the Civil

Rights Act requires accommodation as to Petitioner, but that the Act does not prevent compelling other employees who have other nonreligious reasons for not working. The Brief of the United States at page 36 thereof makes the same argument even if it means violating the Labor Agreement. If all Sunday work is assigned to such employees, there can be a valid objection by these same employees because they are being compelled because of a lack of religion while employees who espouse religious reasons are being excused. The law was intended to prohibit discrimination on any religious basis, i.e., either pro or anti religion. Evidence of this intent is found in the colloquy between Congressman Ashbrook (R., Ohio) and Congressman Celler (D., N.Y.) on the occasion of Ashbrook's offering an amendment to Title VII permitting employers to refuse to hire atheists. Ashbrook posed the following hypothetical:

> "A man comes for employment and the employer is honest enough to tell the applicant, while he is otherwise qualified, he will not hire anyone of atheistic convictions . . . It is my interpretation of the bill that . . . he could allege he has been discriminated against and proceed against the employer.
>
> "I wonder if the chairman of the Committee on the Judiciary could give me his interpretation of this."

Celler replied:

> "The bill provides there can be no discrimination on the ground of religion. That is the answer I have to give you."

After some sparring Ashbrook said:

> "This [refusal to hire an atheist] would be a practice which the employer could not do, according to what you said. He could not discriminate against a person because he is an atheist. Is that correct?"

Celler replied:

"That is correct." (110 Cong. Rec. 2607)

It is submitted that both Petitioner Dewey and the United States, rather than finding a defect in Respondent Reynolds' position, have proposed a "solution" which constitutes a violation of the Act.

In addition to a possible Title VII violation for requiring nonreligious to work on such overtime days even though by seniority and overtime equalization it was not their turn, such action would have placed Respondent Reynolds in violation of the Labor Agreement. Such action would have created a chaotic personnel situation and would have led to grievances and eventually to further arbitrations to determine the scope of the exception or more accurately to determine whether the compulsory work clause had been waived.

To subject Respondent Reynolds to a situation where it would be unable to schedule overtime and be unable to meet its contractual commitments and/or where its Labor Agreement would again be subject to attack through the grievance procedure or through Title VII thus unnecessarily creating difficult relations with the Union and the employees, and at the same time incurring additional costs in terms of time lost reviewing grievances, costs of arbitration, etc., constitutes both serious inconvenience to and undue hardship on the conduct of Respondent Reynolds' business. The Guidelines do not contemplate further accommodation whereby Respondent Reynolds would obtain substitutes for employees with religious beliefs; Petitioner Dewey has been accommodated within the meaning of the Guidelines and the Petition consequently should be dismissed.

V.

THE DISCHARGE OF PETITIONER DEWEY WAS IN GOOD FAITH RELIANCE ON THE LABOR AGREEMENT.

Respondent Reynolds denies that it has committed any violation of Title VII under any construction of the statute. Respondent Reynolds asserts that its disciplining and discharge of Petitioner Dewey was in good faith reliance on the Labor Agreement between Respondent Reynolds and the Union and therefore Petitioner Dewey is not entitled to injunctive relief, back pay or reinstatement.

Section 706(g), as set forth in the Addendum to Brief (Page 61), specifies that if the court finds the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin respondent from engaging in such unlawful practice and order such affirmative action as may be appropriate, which may include reinstatement, with or without back pay. In a case involving the interpretation of Title VII, the United States District Court, District of Oregon, in *Richards* v. *Griffith Rubber Mills*, 300 F.Supp. 338 (1969), ruled that 706(g) as written requires a finding that "the respondent has intentionally engaged . . . in an unlawful employment practice" before the court "may" award relief. The court interpreted "intentionally" to mean wilfully and knowingly and inasmuch as the employer had relied on an Oregon Wage and Hour Commission regulation restricting females from lifting weights in excess of certain amounts, the court found no intentional violation and found no liability of the employer to the employee and further found an injunction inappropriate while citing *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Dodd* v. *Spokane County, Washington*, 393 F.

2d 330 (9th Cir. 1968). In support of finding no intentional violation of the Act, Respondent respectfully submits that no discrimination was found by the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by Respondent and the Petitioner's bargaining agent — the UAW, the Regional Director of the Equal Employment Opportunity Commission in Cleveland nor the Sixth Circuit. In fact to find a violation the Equal Employment Opportunity Commission had to overlook its 1966 Guideline; the District Judge was obliged to also overlook said Guideline and apply a Guideline which came into effect ten months after Petitioner was discharged.

It is submitted that Respondent, Reynolds Metals Company, in assigning Petitioner Dewey to the Sunday overtime assignments pursuant to the compulsory work assignment clause and the seniority system, relied on the Labor Agreement. Consequently, there being no intentional violation there should be no liability on the part of Respondent and there should not have been issued by the District Court any injunction ordering Petitioner Dewey back to work with back pay.

VI.

BY PURSUING THE CONTRACTUAL GRIEVANCE-ARBITRATION PROCEDURE PROVIDED IN THE COLLECTIVE BARGAINING AGREEMENT TO FINAL DETERMINATION, PETITIONER DEWEY MADE A BINDING ELECTION OF REMEDIES WHICH PRECLUDED ANY ACTION IN A FEDERAL DISTRICT COURT UNDER THE CIVIL RIGHTS ACT OF 1964.

The issue raised by the above argument is the concurrent jurisdiction problem that arises in Title VII cases, i.e., jurisdiction under the statutory scheme and under the

grievance and arbitration system of a labor contract. When an employee has such a dual remedy, it has been proposed that while such an employee should be permitted to initiate such dual remedies, at some point a choice of election of remedies must be made. Title VII says nothing about the function of such grievance arbitration procedures and the resolution of employment disputes involving discrimination under Title VII. Thus the task of determining the legislative intent falls upon what the Third Circuit Court of Appeals describes as the sound application of judicial principles and precedents. *Fekete* v. *U. S. Steel Corporation*, 424 F.2d 331 (3rd Cir. 1970).

One of the early decisions bearing on whether or not an employee made a binding election of remedies by pursuing a complaint through the grievance arbitration process was *Bowe* v. *Colgate Palmolive Company*, 272 F.Supp. 332 (S.D. Ind. 1967). The District Court in *Bowe* concluded at page 338:

> "... [I]t is also the belief of the Court that the employee should not be permitted to proceed on the same allegedly wrongful incidents both in the Court and pursuant to his contractual remedies."

The reason for this requirement of an election was that it would be inequitable and unconscionable to subject the defendant to two series of extensive litigation, one in court and one under the labor contract. The next meaningful case was *Washington* v. *Aerojet-General Corporation*, 282 F. Supp. 517 (C.D. Calif. 1968). In this case the California District Court refused to go as far as the Indiana District Court in *Bowe* when it refused to apply a strict *ab initio* election of remedies concept. The California District Court went on to say that initially the grievant may pursue his remedies in both forums, but at some point a choice must

be made. The California District Court commenting on this matter said at page 523:

> "This point, as in the case of concurrent jurisdiction between State and Federal courts, is reached when a litigant has pursued his remedies in one forum to decision, be it by settlement, the decision of an arbitrator, or the decision of a judge."

The same California District Court in a most recent case, *Oubichon* v. *North American Rockwell Corp.*, 3 EPD ¶8071 (December 1970), again applied the doctrine of election of remedies in a contract grievance procedure-civil rights context, noting that the doctrine is based on the notion that an aggrieved party, while entitled to pursue his remedies both through grievance proceedings and through proceedings under the Civil Rights Act, should not be able to subject a defendant to multiple actions based upon the same claim, where as in *Oubichon*, he has pursued his remedies in one forum to a decision.

The first Circuit Court of Appeals to express an opinion was the Seventh Circuit in reviewing the lower court holding in *Bowe*, 416 F.2d 711 (7th Cir. 1969). That Court reversed the lower court on its position of a strict and *ab initio* election of remedies and stated that a plaintiff may utilize dual or parallel prosecution both in court and arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in unjust enrichment. There has been some dispute among the courts as to the meaning of the language of the *Bowe* Circuit Court of Appeals decision in that the California District Court in *Oubichon, supra,* reads the decision as being consistent with its holding while the dissenter in *Dewey* v. *Reynolds Metals Company,* 429 F.2d 324 (6th Cir. 1970) reads the decision

as indicating that the election of remedies doctrine doesn't apply.

The next Circuit Court to review the issue of election of remedies in this matter was the Third Circuit in *Fekete* v. *U.S. Steel Corp., supra.* In that case the Court noted that the Pennsylvania Federal District Court held that the Title VI court action was rendered moot by a labor arbitrator's decision. The Court interpreted the complaint filed in the District Court, however, as one seeking injunctive relief against an allegedly continuing course of discrimination which was unaffected by the arbitration decision. From this one would gather that so long as a grievant seeks relief not otherwise granted by another forum, no forum should be closed to him. In other words, it is applying concurrent jurisdiction with no election of remedies.

The next Circuit Court to express an opinion was the Sixth Circuit in *Dewey* v. *Reynolds Metals Company,* 429 F.2d 324 (6th Cir. 1970). This Court lined up with the California District Court in holding that the grievant may pursue his remedies in both forums but when he has pursued his remedy in one forum to a decision, the issue is moot in the other forum. In this regard the Court said in part (135a):

> "In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.
>
> "This result could sound the death knell to arbitra-

tion of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, *i.e.*, that the awards are binding on them but not on their employees.

"The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration."

The Sixth Circuit went on specifically to note that the issue in the matter before the Court was as follows (136a):

"The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration." (Underscoring in original.)

Finally, the Fifth Circuit has expressed its views on the question. In *Hutchings* v. *United States Industries, Inc.*, 428 F2d 303 (5th Cir. 1970), the Fifth Circuit reversed a lower court holding which in effect followed the reasoning of the Sixth Circuit in *Dewey, supra*. The Fifth Circuit argued in part as follows at page 311:

"We begin by recognizing that determinations under a contract grievance-arbitration process will involve rights and remedies separate and distinct from those involved in judicial proceedings under Title VII...."

At page 312 thereof the Court said:

"At issue in the Title VII proceedings is the statutory right of employees or prospective employees not to be discriminated against on racial or other unlawful grounds regarding matters of their employment. In formulating relief once a violation has been found,

the trial judge is invested with wide discretion in modeling his decree to ensure compliance with the Act."

In continuing the Court said:

> "In the arbitration proceeding, then, the arbitrator's role is to determine the contract rights of the employees, as distinct from the rights afforded them by enacted legislation such as Title VII . . . The arbitrator, in bringing his informed judgment to bear on the problem submitted to him, may consider himself constrained to apply the contract and not give the types of remedies available under Title VII, . . ."

In short, the Fifth Circuit holds that the election of remedies theory is not applicable in the *Hutchings* matter although there is some recognition that there may be an application thereof to prevent a plaintiff from duplicating his relief which would result in unjust enrichment.

In the case before the Court, the first grievance of Petitioner, Trial Exhibit F (62a-63a), dated September 7, 1966, stated in part that the Company policy was "no more than discrimination against these men . . ." In the second grievance dated September 26, 1966, the Petitioner contended that the Company was using the rule to force people to work on Sunday against their religious and moral principles and stated: "We feel this is a clear case of discrimination on the part of the Company." Trial Exhibit H (65a). In the process of the arbitration in which Petitioner Dewey was represented by an International Representative of the United Automobile Workers, the Union suggested that the effect of the application of the Labor Agreement together with the substitute system was to "discriminate against those employees who seek to be excused from assigned work for reasons of religion." Trial Exhibit I (75a). The arbitrator in his resolution of the

grievance held that in his judgment "employees may not flatly refuse to work on these 'exceptional' Sundays in view of their obligations under the Agreement and the Company's consistent administration of the relevant provisions" (76a). The arbitrator went on to say (76a-77a):

> "Suppose that an employee decided to join a religious organization with a Wednesday Sabbath, and that he thereafter refused to work on Wednesdays. It would be obvious, I think, that the Company could properly find this employee in violation of Rule 11; yet, the language of the Agreement makes no distinction for this purpose between straight time and overtime work assignments."

The arbitrator went on to find that the Petitioner, under all the circumstances, had an obligation to utilize the established replacement procedure and that he considered it to be misconduct under the Agreement for them to refuse to do so. The arbitrator added (78a):

> "An important commitment arising out of one's religious convictions and obligations can provide a 'substantial and justifiable reason' for excusing an employee from some particular work assignment, on a Sunday or on some other day. What I found here, however, is that the Agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds. I will therefore not sustain the grievances."

What should be the basis for the decision of this Court in this matter? Should it be predicated on the election of remedies doctrine in an effort to eliminate multiple actions based upon the same claim, or is it the rationale of the Fifth Circuit which states that the rights and remedies under the two procedures are separate and distinct and as such there can be no election of remedies. The latter is the

position of the Petitioner set forth at page 30 of his Brief wherein he says that when the issues or rights litigated in two separate actions are separate and distinct, the doctrine of election of remedies is inapplicable. Close observation, however, will reveal that in the present matter the right that was alleged in the grievances that were disposed of in the arbitration was bottomed on allegations of religious discrimination to the effect that Respondent was forcing employees to work on Sunday against their religious and moral principles. The arbitrator found that the employees could not refuse to work on Sundays in view of their obligations under the Labor Agreement and the Respondent's consistent administration as to all employees of the relevant provisions of said Agreement (76a). The Civil Rights Act as related to religion and employment raises the issue as to whether an employee is treated differently as to other employees on the basis of religion. It is submitted that the rights or issues in the arbitration and Civil Rights action are not distinct, rather they are common. The remedies available under the arbitration system consist of, among other things, reinstatement and back pay, and the fact that a decision acts as a precedent as to future cases. This is the nature of the remedy which is available in Title VII and in fact is the remedy that was employed by the District Court in this matter. It is submitted, with all due respect to the holding of the Court in *Hutchings, supra,* that the analysis as to the differences in rights and remedies in the two procedures is not correct. The rights and remedies are common and it is submitted that the election of remedies doctrine is applicable. Thus the better judicial principle would be that enunciated by the Sixth Circuit and the Federal District Court in California requiring that a grievant may pursue his remedies

in both forums but when he has pursued his remedy in one forum to decision, the issue is moot in the other forum.

The problem that exists in this situation is one that arises where you have national policy of free collective bargaining and binding arbitration which in turn has to vie with uniform federal regulations for the power to control industrial behavior. The creation of Title VII by Congress with complete silence as to the interplay of the grievance-arbitration procedure and the jurisdiction of the federal courts creates another power struggle. The policy as enunciated by the Petitioner and by the United States in its Brief advocates concurrent jurisdiction for arbitrators and federal judges. To do so seemingly avoids the necessity of the United States taking a position as to the relative priority to be assigned to two important, but sometimes conflicting, national policies. But let us look at the possible operation of concurrent jurisdiction. It is fairly obvious on the basis of the present case that it would work poorly, bringing waste, confusion, forum shopping, and double jeopardy. It might even undermine the integrity of collective bargaining and arbitration in the sense suggested by the Sixth Circuit. The Sixth Circuit saw that the application of the concurrent jurisdiction principle in these cases brings about a result whereby an employer is bound by an arbitration decision whereas an employee could continue to litigate. This could result in the death knell of arbitration of labor disputes, a procedure which has been the safety valve in the relationship between management and labor for many years in this country.

The holding of the Sixth Circuit in this matter is compelling not only by reference to principles dealing with the sound and equitable administration of justice but also by reference to the well established federal policy in favor

of resolving industrial disputes through the grievance procedure of a collective bargaining agreement. Starting with *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957), the Steelworkers Trilogy, (*United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)), this Court has emphasized the importance of the voluntary settlement of labor disputes through the vehicle of arbitration. As was pointed out in *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), *Lincoln Mills, supra*, in its exposition of Section 301(a) "went a long way towards making arbitration the central institution in the administration of collective bargaining contracts." In any event, it is difficult to understand why this Court should now accept Petitioner's contention that it subordinate the "central institution" which its decision have done so much to strengthen, in this case, where the alleged rights and remedies involved are in every substantial respect identical in both forums and where relitigation affords the disappointed suitor the benefits of forum shopping with none of its disadvantages.

It is submitted that Petitioner, having here elected to pursue his grievance against Respondent Reynolds under the Collective Bargaining Agreement in which the nature of the issues and the relief sought are identical with those in this action, and having so pursued it to the process of arbitration in which he participated, and concluding with the decision of an arbitrator, must now be held to have made a binding election of remedies and consequently such a Petitioner should be barred from proceeding in this action.

CONCLUSION

It is the position of Respondent, Reynolds Metals Company, that:

1. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion as to employment. The compulsory work provisions of the Collective Bargaining Agreement provided a fair and equitable method of distributing a heavy workload. The work provisions were adopted in good faith, are neutral and were negotiated as a business necessity to enable the plant to operate in certain overtime situations such as Saturday and Sunday.

2. The assignment of overtime on various Sundays, pursuant to the Collective Bargaining Agreement and in particular to the seniority system therein, resulting in different employees working Sundays from time to time, falls within an exception to the Civil Rights Act of 1964.

3. While the Civil Rights Act of 1964 prohibits discrimination in employment because of religion, there is no legal basis to support a requirement of accommodation as established by the Equal Employment Opportunity Commission. Such a requirement possibly violates the Establishment Clause of the First Amendment to the United States Constitution.

4. The 1966 Guidelines of the Equal Employment Opportunity Commission interpret the Act to mean an employer would not be in violation thereof if he established a normal work week applicable to all employees even though such a schedule might not have a uniform effect on all employees. Respondent, Reynolds Metals Company, complied with and relied upon this Guideline and such compliance is a bar to this action.

The replacement system established by Respondent,

Reynolds Metals Company, complies with the 1966 and 1967 Guidelines.

Any further accommodation is not required by the Guidelines and would seriously inconvenience the conduct of Respondent's business.

5. Since rights and remedies sought in the grievance-arbitration system are identical with those sought in Title VII action at law, the election of remedies doctrine applies and Petitioner Dewey should not be allowed to pursue the law action after obtaining a decision in arbitration.

In view of the foregoing, it is respectfully requested that this Honorable Court conclude that:

Respondent, Reynolds Metals Company, has not discriminated as to Petitioner Dewey because of his religion within the meaning of Title VII of the Civil Rights Act of 1964;

And accordingly order that:

a. Relief is not in order and a Judgment be entered dismissing the Complaint.

b. The District Court Judgment of July 25, 1969 Granting Permanent Injunction And Reinstatement, Credit For Seniority And Fringe Benefits And Back Pay be rescinded forthwith.

c. The Respondent, Reynolds Metals Company, be permitted to forthwith cancel the Supersedeas Bond in the amount of Fifteen Thousand Dollars ($15,000.00), which bond was ordered by the District Court under date of July 25, 1969.

d. Petitioner Dewey's request for the costs of this proceeding including attorney's fees be denied.

Respectfully submitted,
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VIESON
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DATED: April 5, 1971

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ADDENDUM

Title VII of the Civil Rights Act of 1964

Section 703(a)(1)
(Title 42 USC Section 2000e-2(a)(1)):

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual; or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Section 703(h)
(Title 42 USC Section 2000e-2(h)):

> "(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer

if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Section 706(g)
(Title 42 USC Section 2000e-5(g)):

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)."

Section 713(a)
(Title 42 USC Section 2000e-12(a)):

"(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

Section 713(b)
(Title 42 USC Section 2000e-12(b)):

"(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title."

Equal Employment Opportunity Commission

RELIGIOUS DISCRIMINATION GUIDELINES

(Effective June 15, 1966)

(31 F.R. 8370)

"Section 1605.1 Observance of Sabbath and religious holidays.—(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

"(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:

"(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.

"(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

"(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

"(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES

(Effective July 10, 1967)
(32 F.R. 10298)

"Section 1605.1 Observance of Sabbath and other religious holidays.—(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RICHARD M. DAWSON

v. Civil Action

J. G. MIZELI No. 528-70-R

MEMORANDUM

Jurisdiction of the Court is attained by virtue of Title 28 U.S.C.A. §§1531(a), 1539, and 1936(a)(2).

Plaintiff, a member of the Seventh Day Adventist Church whose tenets preclude labor on their Sabbath Day, which is from sundown Friday until sundown Saturday, is an employee of the United States Post Office Department in the capacity of a regular carrier.

Defendant, Mizell, is the Post Master of the Post Office in Richmond, Virginia, wherein plaintiff is employed.

From the pleadings, stipulations and evidence introduced before the Court, the Court finds that the plaintiff commenced his employment with the Post Office in June of 1966 as a temporary substitute carrier. Subsequently his employment was converted to a career appointment as a regular city carrier. The Post Office operates under an agreement between the United States Post Office Department and certain organizations of employees of the Post Office Department, which agreement calls for bidding for work assignments on the basis of seniority. As a practical result, when a vacancy in a position occurs, same is posted, mail carriers submit their applications for same, and award of the position is made on the basis of seniority.

At the time of plaintiff's initial employment, he was not a member of the Seventh Day Adventist Church but became

so on May 9, 1970, although he had for some time prior thereto been observing the tenets of the church. There is no doubt of the plaintiff's conscientious and sincere belief in the teachings of his church.

By reason of his lack of seniority, plaintiff now finds himself assigned to a position which requires that he work on Saturday. In an effort to maintain his position consistent with his religious beliefs, plaintiff instead of working on the Saturdays on which he was scheduled to work took those days off and they were charged against his accrued annual leave or charged as leave without pay.

On May 4, 1970, plaintiff was advised that he would be discharged from the postal service by reason of his excessive absences, to-wit: five Saturdays during the months of February, March and April of that year.

On October 2, 1970, a temporary restraining order was entered enjoining the defendant from removing the plaintiff from his position in the Post Office Department, Richmond, Virginia, for failure to perform work on Saturdays by reason of his religious convictions. This order was subsequently thereto elevated to a preliminary injunction pending the outcome of this litigation.

The Court finds that plaintiff attempted to secure relief through the local union, but was unsuccessful. Under the agreement between the Post Office and the unions, any deviation of same is a violation, except that the Post Master may make temporary assignments.

The defendant herein, in an effort to cooperate with the plaintiff, investigated and was advised that any temporary assignment of this plaintiff would be objected to by the union.

There are 1865 employees in the Post Office system in

Richmond. Of these employees, 381 are regular letter carriers, of whom 304 are assigned to work on Saturdays. A little more than a third of the employees in the system work on Saturdays.

There is available to the plaintiff the opportunity to transfer from a regular carrier to a substitute carrier, which would render to him the same amount of money that he is now paid, but would result in the loss of certain of his seniority privileges, which the plaintiff is understandably reluctant to do.

The Court finds that the work of the Post Office requires that mail be processed on a seven day a week basis.

The Court finds that the seniority provisions of the agreement between the Post Office and the unions are some of its more valued aspects. The agreements under which the Post Office works affect approximately 700,000 employees throughout the United States.

The plaintiff seeks relief from the defendant's intention to discharge him by reason of his inability to work on Saturdays.

The Court finds that the assignment by defendant Mizell of the plaintiff to a position resulting in his having Saturdays off would be violative of the spirit as well as the substance of the agreement under which the Post Office employees work.

Plaintiff contends that defendant's contemplated removal of the plaintiff from the postal service by reason of his declining to work from sundown on Fridays until sundown on Saturdays would impose, under the circumstances of this case, a burden of the free exercise by plaintiff of his religion.

The Court concludes that there is no constitutional prohibition against the defendant insisting that plaintiff either agree to perform the duties assigned to him or suffer the consequences. This Court cannot agree with the suggestion of counsel that there would be little, if any, adverse effect on the federal interest in the operation of the Post Office Department and the delivery of the United States mail at Richmond, Virginia, resulting from the assignment of plaintiff to a six day work week with Saturday as a day off. True, the mere granting to plaintiff Saturdays off would not, in and of itself, affect the operation of the Post Office; but the Court cannot overlook the fact that approximately 700,000 people are governed by the agreement which plaintiff suggest the defendant violate.

There can be no doubt from the evidence before this Court, indeed from the plaintiff's own testimony, that the seniority rights contained in the agreement are of the utmost importance to the employees.

The Court finds no infringement of plaintiff's rights concerning his religious beliefs. Religious discrimination should not be equated with failure to accommodate.

Since 1878 it has been recognized that the First Amendment cannot be interpreted as an absolute prohibition on the part of the government from interfering with the exercise of religion. The religious freedom guaranteed under our Constitution was that one could be assured that the legislature would make no law respecting the establishment of religion or prohibiting the free exercise thereof. See *Reynolds* v. *United States*, 98 U.S. 145 (1878). Since the *Reynolds* case it has been recognized that religious practices are subject to reasonable government interference under certain conditions and circumstances.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As a consequence, simply stated we have two religious clauses, one pertaining to "free exercise" and the other pertaining to the "establishment" of religion. The free exercise clause undoubtedly bars regulation of religious beliefs or interference with the dissemination of religious ideas. Its purpose is to prohibit misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." *Gillette* v. *United States*, 39 U.S.L.W. 4305, decided March 8, 1971, quoting from *Braunfeld* v. *Brown*, 366 U.S. 599, 607.

Undoubtedly any burden on First Amendment values must be justifiable in terms of a government's valid aims. Having concluded that in order to accommodate plaintiff's request to select his day off would require a violation on the part of defendant of a binding contract affecting 700,000 people, it is obvious that any incidental burden felt by the plaintiff is certainly justified when one considers that it would be literally impossible to accommodate the religious preference of every employee of the Post Office Department. As stated by Mr. Chief Justice Warren in *Braunfeld, supra,* ours is a cosmopolitan nation "made up of people of almost every conceivable religious preference. These denominations (sic) number almost three hundred . . . Consequently it cannot be expected, much less required, that legislators enact any law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." In *Braunfeld, supra,* the court upheld the validity

of a statute forbidding the retail sale on Sundays of certain commodities.

In addition, it should be noted that the central purpose of the establishment clause is to insure government neutrality in matters of religion. The rule of seniority as called for under the Post Office's agreement cannot, by any stretch of the imagination, be deemed to discriminate on the basis of religious affiliation or religious belief. All that the establishment clause requires is that when government activities touch on the religious sphere "they must be secular in purpose, evenhanded in operation, and neutral in primary impact." *Gillette* v. *United States, supra.*

Plaintiff contends that the Court is bound by the rule laid out in *Sherbert* v. *Verner,* 374 U.S. 398. In that case appellant was a member of the Seventh Day Adventist Church who lost her position with a private employer by reason of her refusal to work on the Sabbath Day of her faith. Unable to obtain other employment because from conscientious scruples she would not take said work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That act provided that to be eligible for benefits, a claimant must be "able to work and . . . available to work," and further that a claimant is ineligible for benefits if he has failed, without good cause, to accept available suitable work when offered him by the employment office or the employer. The South Carolina administrators held the appellant to be ineligible for benefits. Appellant's argument before the respective courts was to the effect that the provisions of the South Carolina law abridged her right to the free exercise of her religion secured under the free exercise clause of the First Amendment through the Fourteenth Amendment. The

United States Supreme Court, speaking through Mr. Justice Brennan, stated that for appellant's constitutional challenge to be withstood, it must rest either because her disqualification as a beneficiary represented no infringement by the state of her constitutional right of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by "compelling state interest in the regulation of a subject within the state's constitutional power to regulate. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438;" See also, *Bates* v. *Little Rock*, 361 U.S. 516, 524.

It should be noted that in the *Sherbert* case it was pointed out that the law of South Carolina expressly saved the Sunday worshiper from having to make the kind of choice which was imposed upon the appellant in that case. Not so in our instant case. There is no evidence of any blanket permission to those who believe Sunday to be the Sabbath to be relieved from work. The holding in *Sherbert* was limited to a finding that a state "may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." That holding, paraphrasing the words of Justice Brennan, merely reaffirmed the principle to the effect that no state may exclude members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

There is nothing in the instant case which suffers the plaintiff to be excluded from any rights because of his faith. The Court finds no action on the part of the Post Office Department which interferes with plaintiff's right to exercise his religion as he sees fit. The fact that no regular mail

deliveries are scheduled on Sunday, the Court finds, is attributable to the fact that the business community dictates the workload. The Court does not find *Sherbert* v. *Verner, supra,* to be apropos in the instant case. In that case the individual was discriminated against in allowance of a public benefit, as distinguished from the instant case.

It is true that there is, to a certain extent, a burden imposed on the plaintiff Dawson in reference to the exercise of his religious belief, to the extent that as a result of the defendant not accommodating the Post Office work schedule to coincide with plaintiff's exercise of his religion, the instant unfortunate situation is created. But as heretofore stated, accommodation cannot be equated with discrimination. While the Court does not find that any burden imposed upon the plaintiff Dawson is constitutionally prohibited, even were the Court to find that the free exercise and establishment clauses were brought into play in the instant case, it can hardly be argued that there is not a compelling governmental interest in the Post Office entering into an agreement providing for seniority rights; for as a corollary to those rights the Post Office is assured of adequate personnel in the movement of the mail. The burden on this agency of the government to accommodate its pattern of work to the special requirements of each individual's religion would result in a chaotic and impossible situation.

Plaintiff's contention that the actions of the defendant are prohibited by the 1964 Civil Rights Act by virtue of Executive Order No. 11478, August 8, 1969, has no validity in the instant case.

As sympathetic as the Court may be with the plaintiff's

predicament, the Court finds no violation on the part of the defendant of any constitutional right of the plaintiff, and the injunction heretofore entered must be dissolved.

An order consistent with these findings will be entered.

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United States District Judge

March 24, 1971.